

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102-3660
TEL: (415) 557-2325 FAX: (415) 557-0855
www.fehc.ca.gov



Fair Employment and Housing Commission Modified Text – Sexual Harassment Training and Education

The modified text is shown as:

New Text = Underline

Deleted Text = Strikeout

The modified text, with underlining and strikeouts, makes changes to the November 14, 2006, version of the Fair Employment and Housing Commission's "Sexual Harassment Training and Regulation" proposed regulations, in response to the Office of Administrative Law's Disapproval Decision dated February 6, 2007.

All written comments must address the modified text only.

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7288.0 Sexual Harassment Training and Education

(a) Definitions. For purposes of this section:

(1) "Contractor" is a person performing services pursuant to a contract to an employer, meeting the criteria specified by Government Code section 12940, subdivision (j)(5), for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(2) "Effective interactive training" includes any of the following:

(A) "Classroom" training is in-person, trainer-instruction, whose content is created by a Subject Matter Expert and provided to a supervisor by a trainer or educator, in a setting removed from the supervisor's daily duties.

(B) "E-learning" training is individualized, interactive, computer-based training created by a Subject Matter Expert and an instructional designer. An e-learning training shall provide a link or directions on how to contact a Subject Matter Expert. The Subject Matter Expert shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked.

(C) "Webinar" training is an internet-based seminar whose content is created by a Subject Matter Expert and taught by a trainer or educator and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively

participated with the training’s interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance.

(D) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.

(E) Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training.

~~(2)~~ (3) “Employee” includes full time, part time, and temporary workers.

~~(3)~~ (4) “Employer” means any of the following:

~~A.~~ (A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

~~B.~~ (B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered “political subdivisions of the state.”

~~(4)~~ (5) “Having 50 or more employees” means employing or engaging fifty or more employees or contractors for each working day in any twenty consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

~~(5)~~ (6) “Instructional Designer” under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a Subject Matter Expert.

~~(6) A “qualified trainer” refers to an individual who either through formal education and training or substantial experience can effectively lead in person or webinars. If the qualified trainer is also a Subject Matter Expert as referenced and defined at 7288.0, subdivisions (a)(7) and (c), then the qualified trainer may answer questions and provide immediate feedback to training participants. If the qualified trainer is not a Subject Matter Expert, then a Subject Matter Expert shall be available to answer questions and provide feedback either during the training session or within two business days.~~

(7) “New” supervisory employees are employees promoted or hired to a supervisory position after July 1, 2005.

~~(7)~~ (8) A “subject matter expert” “Subject Matter Experts” is a trainer or educator as defined at section 7288.0, subdivision (e). are:

(A) Attorneys admitted for three or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

(B) Human resource professionals who are either certified as “Professionals in Human Resources” by the Society for Human Resource Management or have a higher certification, and who also possess a minimum of three or more years practical experience in one or more of the following: a) designing and conducting discrimination, retaliation and sexual harassment prevention training; b) responding to sexual harassment complaints; c) conducting investigations of sexual harassment complaints; or d) advising employers regarding discrimination, retaliation and sexual harassment prevention, or

(C) Professors and instructors in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 25 instruction hours or three or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964 or the content specified below at section 7288.0, subdivision (a)(10)(C).

(D) Individuals with three or more years of experience providing professional advice or consultation to employers regarding discrimination, retaliation, and sexual harassment.

~~(8)~~ (9) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926, subdivision (r). Attending harassment training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

~~(9) “New” supervisory employees are employees promoted or hired to a supervisory position after July 1, 2005.~~

(10) “Trainers or educators” are:

(A) “Subject Matter Experts,” as defined at section 7288.0, subdivision (a)(8), or

(B) Individuals with three or more years of experience designing and conducting discrimination, retaliation, and sexual harassment prevention training programs.

(C) All trainers or educators as defined above shall be qualified to train about the

following:

1. what are unlawful harassment, discrimination and retaliation under both California and federal law;
2. what steps to take when harassing behavior occurs in the workplace;
3. how to report harassment complaints;
4. how to respond to a harassment complaint;
5. the employer's obligation to conduct a workplace investigation of a harassment complaint;
6. what constitutes retaliation and how to prevent it;
7. essential components of an anti-harassment policy; and
8. the effect of harassment on harassed employees, co-workers, harassers and employers.

(D) If the trainer or educator is also a Subject Matter Expert, then the trainer or educator may answer questions and provide immediate feedback to training participants. If the trainer or educator is not a Subject Matter Expert, then a Subject Matter Expert shall be available to answer any questions that the trainer is unable to answer and provide feedback within two business days.

~~(10) "Two hours" of harassment training is two hours of classroom or two hours of webinar training or, in the case of an e-learning program, a program that takes the supervisor no less than two hours to complete.~~

(11) "Training," as used in this section, is effective interactive training as defined at section 7288.0, subdivision (a)(2).

~~(11) Effective, interactive training can mean any of the following:~~

~~A. "Classroom" training is in person, trainer instruction, created by an instructional designer and provided to a supervisor by a qualified trainer, in a setting removed from the supervisor's daily duties.~~

~~B. "E learning" is individualized, interactive, computer based training whose content is written, developed and approved by an instructional designer(s), qualified trainer(s) or subject matter expert(s). An e-learning program shall provide a link or directions on how to contact directly trainers or educators, either working for the employer or retained by the e-learning provider. These trainers or educators shall be available to answer questions and to provide guidance and assistance on harassment training~~

issues within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked.

~~C. “Webinar” is an internet-based seminar created and taught by a qualified trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training’s interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance.~~

~~D. Other “effective interactive training and education” includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training.~~

~~E. For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.~~

(12) “Two hours” of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

~~NOTE: Authority cited: Section 12935(a), Government Code.~~

~~Reference: Sections 12926(r); 12940(j)(5); 12950.1, subds. (a) & (c), Government Code.~~

~~(b) Training.~~

~~(1) Frequency of Training: An employer shall provide two hours of training, in the content specified in section 7288.0, subdivision (c), under this section once every two years, and may use either of the following methods or a combination of the two methods to track compliance.~~

~~A. (A) “Individual” Tracking: An employer may track its training requirement for each supervisory employee, measured two years from the date of completion of the last training of the individual supervisor.~~

~~B. (B) “Training year” tracking: An employer may designate a “training year” in which it trains some or all of its supervisory employees and thereafter must again retrain these supervisors by the end of the next “training year,” two years later. Thus, supervisors trained in training year 2005 shall be retrained in 2007. For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer~~

may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer's other supervisors.

- (2) Documentation of Training. An employer shall keep documentation of the harassment training it has provided its employees under this section to track compliance, including the name of the supervisory employee trained, the date of training, the type of training, and the name of the training provider and shall retain the records for a minimum of two years.
- (3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.
- (4) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.
- (5) Duplicate Training. A supervisor who has received anti-harassment training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor's last harassment training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.
- (6) Duration of Training. The training required by this section does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features which allow a supervisor to pause their individual training so long as the actual e-learning program is two hours.

~~NOTE: Authority cited: Section 12935(a), Government Code.~~

~~Reference: Section 12950.1(a), Government Code.~~

- ~~(e) "Trainers or educators" under this section shall be "Subject Matter Experts" who have legal education coupled with practical experience, or substantial practical experience in training in harassment, discrimination and retaliation prevention.~~

~~(1) The trainer or educator shall be qualified to train about the following:~~

- ~~A. what are unlawful harassment, discrimination and retaliation under both California and federal law.;~~
- ~~B. what steps to take when harassing behavior occurs in the workplace;~~
- ~~C. how to report harassment complaints;~~
- ~~D. how to respond to a harassment complaint;~~
- ~~E. the employer's obligation to conduct a workplace investigation of a harassment complaint;~~
- ~~F. what constitutes retaliation and how to prevent it;~~
- ~~G. essential components of an anti-harassment policy; and~~
- ~~H. the effect of harassment on harassed employees, co-workers, harassers and employers.~~

~~(2) The trainer or educator shall use hypotheticals or examples that illustrate the course content and involve the supervisor through questions, problem solving, and quizzes to insure that the information is understood.~~

~~NOTE: Authority cited: Section 12935(a), Government Code.
Reference: Section 12950.1(a), Government Code.~~

~~(d)~~ (c) Content.

The learning objectives of the training ~~and education~~ mandated by California Government Code section 12950.1 shall be: 1) to assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment" as that term is defined in California and federal law; and 2) to develop, foster and encourage a set of values in supervisory employees who complete mandated training ~~and education~~ that will assist them in preventing and effectively responding to incidents of sexual harassment.

Towards that end, the training mandated by California Government Code section 12950.1, shall include but is not limited to:

- (1) A definition of unlawful sexual harassment under the Fair Employment and Housing Act and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, as specified at Government Code section 12940, subdivision (j), and discuss how harassment of an employee can cover more than one basis.

- (2) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.
- (3) The types of conduct that constitutes sexual harassment.
- (4) Remedies available for sexual harassment.
- (5) Strategies to prevent sexual harassment in the workplace.
- (6) “Practical examples,” such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.
- (7) The limited confidentiality of the complaint process.
- (8) Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- (9) The employer’s obligation to conduct an effective workplace investigation of a harassment complaint.
- (10) Training on what to do if the supervisor is personally accused of harassment.
- (11) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer’s policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer’s policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

~~NOTE: Authority cited: Section 12935(a), Government Code.~~

~~Reference: Sections 12950; 12950.1, subds. (a) & (f), Government Code.~~

(e) (d) Remedies.

As part of an order in an adjudicatory proceeding pursuant to California Code of Regulations, ~~title~~ Title 2, section 7429, the Commission may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance within 60 days of the effective date of the Commission’s order.

~~NOTE: Authority cited: Section 12935(a), Government Code.~~

~~Reference: Section 12950.1(e), Government Code.~~

(f) (e) Compliance with section 12950.1 prior to effective date of Commission regulations.

An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its supervisors prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding ~~harassment~~ training as though it had been done under these regulations.

NOTE: Authority cited: Section 12935(a), Government Code.

Reference: ~~Section~~ Sections 12926(r), 12940(j)(5), 12950, 12950.1, Government Code.

~~7288.0~~ 7288.1 Labor Organizations. (Reserved.)

~~7288.1~~ 7288.2 Apprenticeship Programs. (Reserved.)

~~7288.2~~ 7288.3 Employment Agencies. (Reserved.)

NOTE: ~~Authority cited: Section 12935~~